

**ADVISORY COMMITTEE ON TAX EXEMPT AND GOVERNMENT ENTITIES
(ACT)**

**III. TRIBAL CONSULTATION POLICY
PROJECT GROUP**

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JUNE 21, 2002

RECOMMENDED PROCESS FOR THE INTERNAL REVENUE SERVICE TO FOLLOW IN DEVELOPING A TRIBAL CONSULTATION POLICY

“Consultation is an enhanced form of communication that emphasizes trust, respect and shared responsibility. It is an open and free exchange of information and opinion among parties that leads to mutual understanding and comprehension. Consultation is integral to a deliberative process that results in effective collaboration and informed decision making.”

— “Consultation” defined in Department of Health and Human Services’ Plan For Tribal Consultation

“‘Consultation’ means a process of government-to-government dialogue between the Bureau of Indian Affairs and Indian tribes regarding proposed Federal actions in a manner intended to secure meaningful and timely tribal input¹⁴. Consultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability.”

—From the Bureau of Indian Affairs’ “Government-to-Government Consultation Policy” applicable to American Indian Tribes

“This Administration honors the commitment this nation made in 1970 [when President Richard M. Nixon announced his new national policy of self-determination for Indian tribes] and 1975 [when the President signed into law P.L. 93-638, the Indian Self-Determination and Education Assistance Act] to strengthen tribal governments and lessen federal control over tribal government affairs. *This Administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy on self-government for Indian tribes without threatening termination.*”

—From President Ronald Reagan’s statement on federal Indian policy, January 24, 1983. (Emphasis added.)

I. INTRODUCTION.

Commencing with the Environmental Protection Agency in 1984¹, several departments and agencies of the Federal Government have adopted Tribal consultation policies applicable to the formulation, planning and implementation of Federal projects, programs, policies and other actions that might affect one or more of the 559 federally-recognized Indian or Alaska Native tribes, bands, nations, pueblos, villages and communities (collectively, “Tribes” or “Tribal Governments”).² Although differing in many respects, all of these policies expressly acknowledge the unique government-to-government relationship that exists between the United States and each one of these Tribes. Most if not all of these policies acknowledge their basis in the U.S. Constitution, treaties, federal statutes, Supreme Court decisions and executive orders and policies that, taken together, establish the foundation for the unique relationship between the U.S. Government and the Tribes.

At the conclusion of the first meeting of the Advisory Committee on Tax Exempt and Government Entities (the “Committee”) held on June 25-26, 2001, the Committee observed that the Internal Revenue Service (the “Service”) lacked a formal Tribal consultation policy and that, as have the many other Federal agencies that have frequent dealings with Tribal Governments, the Service should develop such a policy.

The Committee agreed to adopt this specific project—recommending to the Service a process or a series of steps to follow in developing a Tribal consultation policy—rather than designing and recommending the consultation policy itself for a number of reasons. The members of the Tribal Consultation Project Group³ suggested that a successful tribal consultation policy should itself be the product of meaningful consultation with the Tribal Governments to which it would apply. This is so because the extent of cultural and organizational diversity among Tribes and their governing bodies is significant, and because many Tribes have limited experience interacting with agencies of the Government that, historically, have not been active in Indian affairs. In addition, we believe that by engaging the Tribes in the process of developing a consultation policy, the Service would be demonstrating from the outset that it has embraced the principle of government-to-government dealings with the Tribes and would thereby increase the likelihood that the Service’s consultation policy will be

¹ See *Environmental Protection Agency’s Indian Policy* adopted by EPA Administrator William D. Ruckelhaus on November 8, 1984. EPA Administrator Christine Todd Whitman expressly reaffirmed the 1984 Tribal Consultation Policy on July 11, 2001.

² See, e.g., Department of Energy “*American Indian Tribal Government Policy*,” first issued on April 8, 1992, and updated as the Department’s “*American Indian and Alaska Native Tribal Government Policy*” on October 31, 2000; Department of Justice “*Policy on Indian Sovereignty and Government-To-Government Relations with Indian Tribes*,” adopted June 1, 1995; General Services Administration “*Policy Toward Native American and Alaskan Tribes*,” adopted November 17, 1999; and Department of Interior, Bureau of Indian Affairs “*Government-To-Government Consultation Policy*,” adopted December 13, 2000.

³ Jayne Fawcett, Perry Israel and David A. Mullon Jr.

perceived as a genuine expression of its commitment to that principle.⁴ Accordingly, the Committee feels that a careful “scoping” of potential issues and concerns with regard to federal tax matters and an effort to make direct contact with as many as possible of the hundreds of federally recognized Tribes are essential to the formulation of an effective, informed Tribal consultation policy.

RECOMMENDED STEPS FOR DEVELOPING A TRIBAL CONSULTATION POLICY.

The Service should take the following steps in the course of developing a Tribal consultation policy: (1) give notice to all Tribes of its intent to adopt a Tribal consultation policy and conduct regional “scoping” or consultation meetings; (2) conduct a series of regional consultation meetings; (3) prepare and circulate a proposed consultation policy and receiving Tribal comments thereon; and (4) adopt the policy.

A. Give notice of intent to adopt policy and conduct regional meetings.

As the first step in the process of developing a Tribal consultation policy, the Service should prepare a clearly written statement or announcement that it intends to adopt a Tribal consultation policy and that it will conduct a series of regional consultation or scoping meetings in order to discuss such a policy with tribal leaders and representatives and receive their comments and recommendations for the policy. The Committee recommends that the Service conduct a scoping meeting in the city or town of the Bureau of Indian Affairs regional office in each of the twelve BIA administrative regions, and that a schedule of the meeting dates be communicated to the leaders of all Tribes as far in advance as possible. The announcement of the Service’s intent to develop a Tribal consultation policy and the schedule of meeting dates should be sent to Tribes and Indian organizations by mail, email and facsimile, published in the Indian press, and posted on the IRS website. The Service should also consider seeking assistance from national Indian organizations in disseminating its statement of intent to develop the policy, in scheduling and, if possible, conducting regional scoping meetings, and in preparing meeting agendas.

Conduct scoping meetings before preparing a draft policy.

The scoping meetings should be used to solicit written and oral comments and suggestions from Tribes and Indian organizations on what should be included in an IRS Tribal consultation policy as well as on how the Tribes would like to collaborate in the formulation of the policy.⁵ Each meeting should be conducted in accordance with a

⁴The Committee does not intend to suggest here the content or wording of the policy or the matters that it should address. The content of the policy, including without limitation the various kinds of Service actions and activities that should be undertaken only after meaningful tribal consultation, should be addressed by the Service and the Tribes as the policy is being developed pursuant to the recommendations in this report.

⁵ It is possible, for example, that the Tribes may recommend the formation of a joint federal/Tribal committee or a Tribal leaders task force to work on the policy. If so, the members representing the Tribes on such a committee or task force should be selected by the Tribes themselves. Use of a committee or task force can be an efficient vehicle for receiving input from Tribes, and either would be something that the Tribes are familiar with. The Federal Advisory Committee Act, 5 U.S.C. App.2., would

written agenda which should be distributed well in advance of the meeting and, in addition to any presentations to be made by Government representatives, should provide ample opportunity for Tribal representatives to speak and present their views on what the policy should include and/or address. Attendees should be encouraged to submit written comments at any time during the meeting or within a reasonable time following the meeting; therefore, addresses for mailing or emailing comments to the Service should also be made available.

C. Prepare and distribute a draft consultation policy.

After receiving comments from Tribes and/or any joint Federal/Tribal committee, Tribal leaders task force, or workgroup designated by the Tribes, the Service should prepare and make available to Tribes and tribal organizations a draft of the proposed policy and a notice of opportunity to submit comments on and/or proposed changes to the draft policy within a clearly stated time. The notice should include, in addition to the deadline for submitting comments and/or proposed changes, the name of the Government office responsible for receiving comments and proposed changes and the address to which comments should be mailed. If feasible, comments should be accepted via email as well, in which case an email address should be stated in the notice. Copies of the draft policy and the notice should be mailed, sent by facsimile and email to the Tribes and Indian organizations and should be made available for review/downloading on the IRS website further comment and input prior to adopting a final policy.

D. Adopt and distribute a final consultation policy.

After reviewing and evaluating any comments received from Tribes, Indian organizations and other interested parties, the Service should adopt a formal Tribal consultation policy. The final policy should be disseminated as described in paragraph C, above.

probably not apply to such a committee or task force. See 2 U.S.C. §1534(b). Again, national or regional Indian organizations should be considered for assisting in the creation of any such committee, task force or workgroup and coordinating its work. If, early in the process, there appears to be a clear consensus among the Tribes that a task force approach is preferable to the series of regional meetings recommended here, or that a task force approach should be used along with the regional meetings, the Service should defer their collective judgment.